Supreme Court, U.S.
FILED
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No.

IN THE

Supreme Court of the United States

October Term, 1999

CHARLES B. WELLS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

CHARLES B. WELLS, *Pro Se*
3491 Riverina Drive
Pensacola, Florida 32514-8158
(850) 484-3070

September 30, 1999

538

QUESTIONS PRESENTED

1. Whether the District Court has subject matter jurisdiction to dismiss a petitioner's pro se complaint, without developing the record, prior to service of process, over the objection of the petitioner, when there has been no appearance made by the defendant causing the matter to be placed into controversy?

2. Whether an FTCA cause of action for a federal tort claim accrues upon the date of injury, upon the date claimant learns of the nexus between his injury and the government's nexus to his injury, or when claimant has received a denial of his claim in writing via administrative remedy pursuant to Title 28 U.S.C. § 2675(a)?

3. Whether the court has personal jurisdiction to adjudicate the rights of the parties before service of process upon the defendant has occurred?

4. Whether a plaintiff has been denied meaningful access to the Court and due process where a magistrate recommends dismissal without permission of the parties to act, and where no service of process has occurred?

5. Whether *Feres* acts as a bar to all tort claims simply because claimant was a member of the armed services at some point in time and is drawing veterans benefits, without regard to the nature of the alleged injury, or the claimant's status at time the injury is manifested?

6. Whether a court reviewing sufficiency of a pro se complaint may refuse to consider the allegations of the complaint as not being true?

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IN THE

Supreme Court of the United States

October Term, 1999

CHARLES B. WELLS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Petitioner Charles B. Wells respectfully prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Eleventh Circuit and of the United States District Court of the Northern District of Florida.

OPINIONS BELOW

The opinion of the Court of Appeals is a Non-published Per Curiam opinion which is reprinted in the Appendix at pages 1a-2a. The Per Curiam judgment upon reconsideration of a quorum for the original appellate panel is also unpublished which is reprinted at 3a-

4a. The District Court Magistrate's Report and Recommendation is unpublished and is reprinted in the Appendix at 5a-6a. The District Court's Order dismissing Petitioner's Pro Se complaint prior to service is unpublished and is reprinted in the Appendix at 7a-14a.

JURISDICTION

The Court of Appeals issued its per curiam opinion on June 2, 1999. Petitioner filed a timely motion for rehearing, which was denied by the Court of Appeals by its issuing a mandate on September 10, 1999, affirming the district court's dismissal of petitioner's complaint prior to service, without giving an opportunity to amend the complaint. Appendix at 3a. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved in this case are: First and Fifth Amendments to the U.S. Constitution; 28 U.S.C. § 1346(b); 28 U.S.C. 2401(b); 28 U.S.C. § 2672; 28 U.S.C. § 2673; 28 U.S.C. § 2674; 28 U.S.C. § 2675; 28 CFR § 14.2 ; 28 CFR § 14.2(b)(1); 28 CFR § 14.2(b)(2); 28 CFR § 14.2(c); 28 CFR § 14.5; 28 CFR § 14.8; 38 CFR § 14.604(a); 38 CFR § 14.604(c). These provisions are reprinted in the Appendix at pages 15a - 27a.

STATEMENT OF THE CASE

Petitioner, an Eastern Airline Pilot from January 2, 1968,to April 1, 1973, began receiving VA benefits after it was established in 1986 that he suffered from exposure to Dioxin and PTSD, after Petitioner was placed on medical suspension by the Federal Aviation Administration in 1973.

In 1993, suspecting governmental negligence in failing to warn of the dangers of untreated stress causing petitioner's injury after his Honorable Discharge in 1969, petitioner filed an SF-95 form with the Department of Justice advising them of the criminal nature of

withholding known scientific medical research, solely in the government's hands, of medical dangers regarding stress and its effects if untreated. Petitioner was never advised of tort claim procedures or given an SF-95 form until April 1993, despite seeking VA benefits. Petitioner learned that he did not have to be a victim of PTSD, and that the government suppressed medical evidence of tests which would have allowed early detection and prevention of PTSD. The SF-95 form provided by the Department of Justice was submitted to the Department of Justice in May of 1993.

In 1993, petitioner began to discover evidence that the reason he got PTSD was the government's failure to share or provide medical research to the medical community regarding the fact that no treatment for stress would cause Post Traumatic Stress Disorder. Their data revealed: a continued lack of treatment would result in permanent irreversible injury. Petitioner discovered that the United States of America, the Surgeon General and other federal agencies knew Post Traumatic Stress Disorder would occur if stress was left untreated. There are actually fifteen million American victims of PTSD at this time as compared to 120,000 acknowledged by Department of Veterans Affairs.

After filing the SF-95 form in May 1993, Petitioner was often contacted by individuals claiming they were from the Justice Department and that they were investigating petitioner's claims of governmental negligence in continuing to suppress this medical evidence from the medical community and those responsible for giving veterans and other American citizens medical treatment after service, as well as the public at large.

Petitioner has never received a written denial of his claims from the Department of Justice, or notice that they were not the appropriate agency to resolve his claim. Petitioner later filed an amended SF-95 to increase the damages sought as well as giving more data to assist in investigating petitioner's claim.

On November 25, 1997, petitioner made his choice to file a

tort claim in the Northern District of Florida where he resided since he had not been given a written denial of his claim from the Department of Justice as the appropriate federal agency.

On December 9, 1997, Magistrate Miles Davis issued a Report and Recommendation recommending dismissal, without authority, and without service of process having occurred on the defendant. The magistrate asserted that courts did not have jurisdiction to review veterans benefit denial, and recommended dismissal for lack of jurisdiction.

On December 17, 1997, Petitioner filed timely objections, pointing out the lack of service, and that the magistrate had no authority or permission to act in the case, and that petitioner was already receiving 100% disability benefits.

On January 8, 1998, petitioner filed an amended complaint while trying to get a summons issued by the clerk to serve the defendant. The amended pro se complaint made it clear that this was a tort claim, and that petitioner was electing to consider the failure of the Justice Department to deny his SF-95 in writing sent to them in 1993, a denial and file in court as allowed by title 28 U.S.C. 2675(a).

On January 30, 1998, the district court dismissed petitioner's complaint for jurisdictional reasons such as not having filed an SF-95 form when he began to be paid benefits before service of process or the appearance of any defendant. Petitioner filed objections on February 6, 1998, pointing out that service had not been performed, that the court had failed to develop the record or allow petitioner to amend the complaint to correct the complained of defects by the court, before the defendant had appeared or been served. The district court denied petitioner's objections without reason.

Timely notice of appeal was filed. On June 2, 1999, the Eleventh Circuit issued a per curiam order affirming the district court's dismissal, using a quorum pursuant to 28 U.S.C. § 46(d).

The appellate court held that the district court's dismissal for lack of subject matter jurisdiction was proper because Petitioner failed to comply with the FTCA's notice requirement, without stating how it was not complied with. The appellate court also held the claim properly barred by *Feres* because the injury occurred incident to his military service. Finally, the appellate court held without stating why amendment of the complaint would have been futile, that the district court properly denied leave to amend the complaint because amendment would have been futile.

Petitioner timely requested a reconsideration with a suggestion for rehearing en banc which was denied on September 10, 1999, by the issuance of a judgment/mandate affirming the June 2, 1999, order.

JURISDICTION BELOW

The district court below had jurisdiction pursuant to Title 28 U.S.C. § 1346(b). The Eleventh Circuit Court of Appeals had jurisdiction over the appeal under 28 U.S.C. §1291.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD RESOLVE THE CONFLICT AMONG THE SECOND, THIRD, FIFTH, SIXTH, SEVENTH AND ELEVENTH CIRCUITS THAT EXIST IN APPLYING THE LAW REGARDING WHEN A CAUSE OF ACTION ACCRUES AND WITH *KUBRICK* THAT MEDICAL CLAIMS ACCRUE WHEN A CLAIMANT KNOWS OF BOTH THE INJURY AND ITS CAUSE, NOT SOLELY UPON THE FACT OF THE INJURY.

The record makes it clear that the district court failed to

establish what type of tort claim is presented by the facts of this scant record.

Equally troublesome is that the courts failed to accept the allegations of the complaint as true. *Cooper v. Pate*, 378 U.S. 546 (1964).

No where in the courts below was petitioner's pro se status considered when reviewing the sufficiency of the complaint. It seems clear that the court wanted every fact upon which the claim was based pled in the complaint which runs afoul of *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); and *Taylor v. Gibson*, 529 F.2d 709, 714 (5th Cir. 1976).

A liberal reading of the complaint reveals this to be a medical malpractice claim. Georgia law makes it malpractice to refer a patient for treatment knowing it will be ineffectual or to withhold treatment when it is known non-treatment will cause injury. This is the law in both Georgia and Florida.

Dismissals on the basis of bare bones pleadings is a tortuous thing. *Shull v. Pilot Life Insurance Company*, 313 F.2d 445 (5th Cir. 1963). This Court has held that if a court is dismissing a complaint on subject-matter jurisdictional grounds that it should not proceed to address the merits. *Bell v. Hood*, 327 U.S. 678, 682 (1946).

Several district courts have held that post-discharge failures to warn claims are not barred by *Feres*. *See Seveney v. United States*, 550 F.Supp. 653 (D.R.I. 1982); *Everett v. United States*, 492 F.Supp. 318 (S.D. OH 1980); *Thornwell v. United States*, 471 F.Supp. 344 (D.D.C. 1979); also see *Cole v. United States*, 755 F.2d 873, 880 (11th Cir. 1985); *Kelly v. United States*, 512 F. Supp. 356 (E.D PA. 1981). In *Henning v. United States*, 446 F.2d. 774 (3d Cir. 1971), the Third Circuit joined other district courts in recognizing post-discharge tortuous conduct, even though it relates back to an injury suffered during military service, may under certain circumstances be actionable as a tort claim. Petitioner in the case at bar contends that

his complaint could have been amended to state a post-discharge tort separately from any failure to warn while in the service. *Broudy v. United States*, 722 F.2d 566 (9th Cir. 1983).

The standard, even after service of process is that it must appear beyond a doubt that the plaintiff could prove no set of facts in support of a claim which would entitle him to relief. *Miller v. Stanmore*, 636 F.2d 986, 991-993 (11th Cir. 1981); *Matthews v. United States*, 456 F.2d 395, 397 (5th Cir. 1972); *Cook and Nichol, Inc. v. Plimsoll Club*, 451 F.2d 505, 506 (5th Cir. 1971).

In the courts below, it is unknown why the district court tied the date of accrual of petitioner's tort claim solely to the date petitioner began to receive VA benefits. VA benefits are paid without having to prove anyone at fault. Clearly, the district court erroneously believed that filing an SF-95 form within two years was jurisdictional and could not be tolled contrary to *Irwin v. Veterans Affairs*, 498 U.S. 89, 95 (1990), and *Glarner v. U.S. Dept. of Veterans Affairs*, 30 F.3d 697 , 701 (6th Cir. 1994).

As noted by the Sixth Circuit in *Glarner*, "According to 38 C.F.R. § 14.604(a), it had a duty to provide Glarner with an SF-95." The Sixth Circuit held that the statute of limitations was tolled by the United States' failure to provide an SF-95 and explain administrative remedies.

In the district court below, it is obvious that the court refused to consider whether the statute of limitations was tolled by the government's failure to provide petitioner with an SF-95 and inform him of the exhaustion of administrative remedy requirements.

The district court clearly held the date of accrual as the date of injury, it stated: "Without further facts, the plaintiff's claim for failure to warn accrued in 1986, when it was first determined that he suffered from PTSD." This ignores the teachings of *Kubrick* for medical malpractice claims which a liberal reading of petitioner's pro se complaint alleges. This Court in *Kubrick* held: "We are

unconvinced that for statute of limitations purposes a plaintiff's ignorance of his legal rights and his ignorance of the fact of his injury or its cause should receive identical treatment. That he has been injured in fact may be unknown or unknowable until the injury manifests itself; and the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain." Here, the defendant had sole possession of the knowledge that stress, if left untreated, will result in PTSD, but can be avoided with minimal treatment prior to it being manifested. This information was withheld from the medical community and the public at large, and was solely in the hands of the defacto defendant. Thus, petitioner had little chance to discover the nexus or cause of his injury to the defendant. In the case at bar, the complaint and pleadings filed alleged dilatory treatment of the SF-95 form filed in 1993, misdiagnoses of petitioner's condition, and the failure of the Veteran's Administration to inform him of petitioner's duty to file an SF-95 form.

The above view of how a medical malpractice claim accrues for the purposes of FTCA is in line with this Court's holing in *Kubrick* at 122, and the Eleventh Circuit in *Price v. United States*, 775 F.2d 1491, 1493 (11th Cir. 1985); *Cole v. United States*, 755 F.2d 873, 880 (11th Cir. 1985); and more recently in *Diaz v. U.S.*, 165 F.3d 1337, 1339 (11th Cir. 1999).

The district court's view of the term "incident to service" failed to consider that if an individual has been discharged from the service that their activities are normally not "incident to military service." At issue here is whether this case is controlled by *Feres or Brown*. The district held that *Feres* controlled and did not consider whether *Brown* would apply. This is contrary to this Court's holding in *United States v. Brown*, 348 U.S. 110, 111 (1954); and *Kubrick* at 122. It also departs from the standard that courts must view the evidence in the light most favorable to the plaintiff. See *Scheuer v. Rhodes*, 416 U.S. 232, 237 (1974); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

The injury for which suit was brought now before the court was not incurred while petitioner was on active duty or subject to military discipline. Here, petitioner was honorably discharged in 1969, and did not exhibit any signs of injury until several years later. Petitioner's injury occurred after his discharge, while enjoying civilian status. These facts show that *Brown* not *Feres* controls. It is the lack of record development which makes review an exercise in guesswork, rather than de novo review.

II. THE COURT SHOULD UTILIZE ITS SUPERVISORY POWERS TO MAKE CLEAR THAT A COURT MUST NOT DISMISS A CAUSE OF ACTION UNTIL AFTER SERVICE OF PROCESS HAS OCCURRED AND AFTER A CONTROVERSY EXISTS BY THE APPEARANCE OF A DEFENDANT.

In the district court below, the defendant was never served a summons or complaint, or appeared before the magistrate and district court were dismissing petitioner's complaint. Petitioner objected both to the magistrate's attempt at dismissal, and later objected to the district court's dismissal prior to service.

Petitioner argued that the defendant should be served and allowed to appear without having to fight the court staff for the right to present evidence. Petitioner felt that the grounds for dismissal asserted by both the magistrate and the district court should have been raised by the defendant, after service. Petitioner felt that the court staff departed from their role as impartial arbiters, and said so. This Court has reversed for similar reasons last year.

This Court has viewed the burden of proof on defenses assertable by a defendant. *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982); *Butz v. Economou*, 438 U.S. 478 (1978). In Butz we acknowledged that federal officials may receive absolute immunity in the exercise of certain functions, but emphasized that the burden is on

the official to demonstrate that an "exceptional situatio[n]" exists, in which "absolute immunity is essential for the conduct of the public business." See *Butz*, supra, at 507; *Harlow*, 457 U.S., at 812.

III. THE COURT SHOULD GRANT THE WRIT TO PROTECT THE CONSTITUTIONAL RIGHT TO DUE PROCESS AND MEANINGFUL ACCESS TO THE COURT BY HOLDING THAT COURTS MUST DEVELOP THE RECORD AFTER SERVICE OF PROCESS WHEN IT HAS PERSONAL JURISDICTION OVER THE PARTIES BEFORE DISMISSING A COMPLAINT ON THE BASIS OF BARE BONES PLEADINGS.

Rule 4 of the Federal Rules of Civil Procedure governs service of process required in all civil actions filed in federal courts. In addressing the jurisdictional nature of the rule, some courts of appeal analyze a court's personal jurisdiction as a function of two elements: amenability to jurisdiction and service of process. Amenability being the substantive reach of jurisdiction of the forum and service of process being the means by which jurisdiction is asserted. *See Jim Fox Enterprises, Inc. v. Air France*, 705 F.2d 738, 741 (5th Cir. 1983); *Terry v. Raymond International, Inc.*, 658 F.2d 398, 401 (5th Cir. 1981).

It has also been held that without personal service of process in accordance with rule 4 or the law of the state in which the suit is filed that a federal district court is without jurisdiction to render a personal judgment against a defendant or adjudicate the rights of the parties. *See Royal Lace Paper Works Inc. v. Pest Guard Products Inc.*, 240 F.2d 814 (5th Cir. 1957).

Valid service is required before a court can exercise jurisdiction over a defendant, and without substantial compliance with rule 4 it is irrevelant whether a defendant has notice of the claim. *J.O. Alvarez, Inc., v. Rainbow Textiles, Inc.*, 168 F.R.D. 201 (S.D.Tex. 1996); *Mateo v. M/S Kiso, 805 F.Supp. 792 (N.D.Cal. 1992).*

Due process must be observed, and the court may not dismiss a claim before both parties have appeared and placed the matter into controversy. *Literature, Inc. v. Quinn*, 482 F.2d 372, 374 (1st Cir. 1973).

IV. THE COURT SHOULD GRANT THE WRIT TO CLARIFY THAT *FERES* DOES NOT BAR ALL CLAIMS SIMPLY BECAUSE A CLAIMANT IS RECEIVING VETERANS BENEFITS OR HAS PRIOR MILITARY SERVICE.

As this Court has made clear in *Brown* and *Brooks v. United States*, the *Feres* doctrine doesn't bar FTCA claimants or force them to choose whether to seek veterans benefits or file a tort claim. Likewise, getting VA benefits does not bar an FTCA claim. The Government is entitled to offset FTCA damages by the amount of benefits paid. *Parker v. United States*, 611 F.2d 1007 (5th Cir. 1980).

Moreover, the FTCA was passed as in this Court's view because of the "offspring of a feeling that the Government should assume the obligation to pay damages for the misfeasance of employees in carrying out its work." *Dalehite v. United States*, 346 U.S. 15 (1953).

The lack of service and record development make it impossible to hold that petitioner could not beyond reasonable doubt state a claim upon which relief could be granted.

V. THE COURT SHOULD GRANT THE WRIT TO ENSURE COMPLIANCE WITH ITS OWN DECISIONS AS WELL AS UNIFORMITY OF APPLYING THE LAW, BECAUSE NOT ALL DUTY-TO-WARN CLAIMS ARE BARRED BY *FERES* UNDER *BROWN, DIAZ, PRICE, RISE, ADAMS.*

In the case at bar, futility was found without any supporting

reasons. In the case at bar, petitioner should be allowed to amend his complaint and serve the defendant, before being dismissed without an opportunity to give notice of his claim.

In the case at bar, all of the evidence which would tend to indicate the misfeasance and negligence of the United States regarding their suppression of the medical data in the possession of the United States which should be made available to the medical community under international law, both the part that treats the public at large and those with prior military service, compels further investigation into the truth to discover why there are 15 million Americans who have PTSD, when there are tests and treatment available to allow early detection and preventative treatment.

Post Traumatic Stress Disorder is a preventable major public health hazard, placing a high percentage of the public at risk from those occupations where stress is a daily fact of life. This disorder does not recognize any barrier in the form of sex, race, age or national origin. No one is not at risk as long as the United States continues to suppress its knowledge of how to detect and prevent the onset of PTSD.

If courts may hold the United States liable for the negligent operation of a light house, which they have assumed the duty to provide mariners, then it is inconceivable that they may not also be held liable for withholding diagnostic tools available and treatment which could eliminate PTSD before it occurs.

The suppression of these tests and treatment methods places the entire world's population at risk of a known dangerous medical health risk. But for the negligence and misfeasance of those responsible for not providing medical data to the medical community worldwide. Those suffering from PTSD have a shortened life expectancy, just like those who smoke cigarettes. If the tobacco industry should pay for failing to warn the public, then there is not one logical reason not to hold the United States to the same duty under the law. *Rise v. United States*, 630 F.2d 1068, 1072 (5th Cir. 1980).

CONCLUSION

The record does not establish beyond doubt that petitioner could prove no set of facts which would warrant relief. The United States suppressed the existence of relatively inexpensive medical tests from the medical community which can detect the probable onset of PTSD by monitoring certain enzyme and compound levels in the body.

It is unknown why the Veterans Hospitals in which petitioner was held for treatment and evaluation did not inform petitioner of his duty to file an SF-95 until he was told by the Justice Department in 1993, as required by 38 CFR 14.604.

As the United States Government has assumed the responsibility and power to rigidly control medical treatment in all its forms, it should not be allowed to perform this duty in a negligent, unlawful manner.

Withholding treatment and diagnostic tools for stress when the United States knows the continued failure to treat for the effects of stress will result in permanent, irreversible injury known as PTSD is not only negligence and misfeasance, it is an affront to every civilized nation, and violates international law.

For the reasons set forth above this Court should grant the Writ of Certiorari sought herein.

Respectfully submitted,

Dated: Sept 30 '99

Charles B Wells

Charles B. Wells, pro se
3491 Riverina Drive
Pensacola, Florida 32514-8158
(850) 484-3070

APPENDIX

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 98-2239
Non-Argument Calendar

D.C. Docket No. 3:97-Cv-507-RV

CHARLES B. WELLS,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Florida

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(June 2, 1999)

Before ANDERSON, Chief Judge, HATCHETT and MARCUS, Circuit Judges. *

PER CURIAM:

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*This decision is rendered by a quorum, due to the retirement of then-Chief Judge Hatchett on May 14, 1999. 28 U.S.C. § 46(d).

Charles B. Wells, pro se, challenges the district court's sua sponte dismissal of his complaint under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346, 2671-2680, for lack of subject matter jurisdiction. The government moves to dismiss this appeal, arguing that this court lacks subject-matter jurisdiction because the district court lacked subject-matter jurisdiction to entertain Well's action.

This Court is obligated to inquire into its jurisdiction at any point in the appellate process. *Zatler v. Wainwright*, 802 F.2d 397, 399 (11th Cir. 1986). We review de novo a district court's dismissal for lack of subject-matter jurisdiction. Ochran v. United States, 117 F.3d 495, 499 (11th Cir. 1997). We further review de novo a district court's construction and application of the FTCA. Andrews v. United States, 121 F.3d 1430, 1438 (11th Cir. 1997). This court also reviews de novo a district court's denial of leave to amend. James v. Arrow Co., 75 F.3d 1528, 1534 (11th Cir. 1996).

Upon review of the complaint and amended complaint, the magistrate judge's report and recommendation and the response, the district court's order and the response, and consideration of the parties' briefs, we hold that we have jurisdiction to review this appeal and find no reversible error.

The district court properly concluded that it lacked subject-matter jurisdiction because Wells failed to comply with the FTCA's notice requirement. The court also properly concluded that Wells's duty-to-warn claim was barred by Feres v. United States, 340 U.S. 135 (1950), because his injury occurred incident to his military service. The district court properly denied Wells leave to amend his complaint because any amendment would have been futile.*

AFFIRMED.

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*The appellee's motion to dismiss is moot.

United States Court Of Appeals

For the Eleventh Circuit

No. 98-2239
Non-Argument Calendar

District Court No. 3:97-Cv-507

CHARLES B. WELLS,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Florida

Before ANDERSON, Chief Judge, HATCHETT and MARCUS, Circuit Judges.*

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

It is further ordered that plaintiff-appellant pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

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* This decision is rendered by a quorum, due to the retirement of then-Chief Judge Hatchett on May 14, 1999. 28 U.S.C. § 46(d)

Entered: June 2, 1999
For the Court: Thomas K. Kalm, Clerk

By: Matt Davision
Deputy Clerk

ISSUED AS MANDATE: SEP 10 1999

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

CHARLES B. WELLS
PLAINTIFF,

vs.

UNITED STATES DEPARTMENT OF
VETERANS AFFAIRS,

Defendant.

REPORT AND RECOMMENDATION

This cause is before the court upon Plaintiffs initial pleading, entitled "motion" which the clerk docketed as a civil complaint against the United States Department of Veterans Affairs (doc.-2). Plaintiff served in the United States Army from 1964-1968, including one year of combat in Vietnam. He contends that he in 1973 he was found to have psychological problems and a "bio-chemistry imbalance," and was later diagnosed with Post-Traumatic-Stress Disorder. He appears to contend that his problems are a result of his service in Vietnam, during which time he was exposed to the exfoliant Agent Orange.

Plaintiff states in his complaint "in 1986 the VA started a monthly compensation," which the court reads as stating that plaintiff began to receive benefits at that time. He apparently appealed the decision not to award benefits retroactively to 1973, but this appeal was denied. According to the civil cover sheet (doc.2), plaintiff now seeks $ 500,00 in damages, although he mentions millions in lost salary and investments, medical costs and legal expenses in the body of the complaint.

Although the plight of a veteran who has been harmed while serving his country is sympathetic, this court is without jurisdiction to hear claims such as that raised by th plaintiff. Title 38 U.S.C. §

511(a) provides:

(A) The Secretary shall decide all questions of law and fact Necessary to a decision by the secretary under a law that Affects the provision of benefits by the secretary to veterans or the dependents or survivors of veterans. Subject to Subsection (b) the decision of the secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.

Subsection (b) contains limited exceptions, only one of which need be mentioned here. Section 511(b)(4) provides that matters covered by chapter 72 of title 38 are subject to judicial review. However, § 7252 (a) provides in pertinent part that "[t]he Court of Veterans Appeals shall have exclusive jurisdiction to review decisions of the Board of Veterans Appeals." Therefore, even if the plaintiff is seeking timely judicial review of a reviewable decision, this court does not have jurisdiction to entertain his claim.

Accordingly, it is respectfully recommended;

That this case be dismissed for lack of jurisdiction.

At Pensacola, Florida, this 9th day of December, 1997.

S/S

MILES DAVIS
UNITED STATES MAGISTRATE
JUDGE

Notice to the parties .

Objections to these proposed findings and recommendations may be filed within ten days after being served a copy thereof. A copy of objections shall be served upon the magisrate judge and all other parties. Failure to object may limit the scope of appellate review of factual findings. See 28 U.S.C. § 636; local rule 27(b); United States v. Roberts, 858 F.2d 698,701 (11th cir.1988).

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

CHARLES B. WELLS,

Plaintiff,

v.

UNITED STATES OF AMERICA,
DEPARTMENT OF VETERANS'
AFFAIRS,

Defendants,

_____/

ORDER

This case is before the court upon the plaintiffs initial pleading, entitled "motion", which the clerk docketed as a civil complaint against the United States Department of Veterans, Affairs (doc.2) and his amended complaint against the United States of America and the Department of Veterans Affairs, for damages under the Federal Tort Claims Act ("FTCA") Title 28 U.S.C. §2671,et seq.][1] (doc.6)

[1]It is not clear from the amended complaint whether the plaintiff has actually named both the United States of America and the Department of Veterans' Affairs. However, in his objections to the magistrate judges report and recommendation, the plaintiff stated that his action is really a tort claim against the United States of America. Since the plaintiff is proceeding pro-se, I will give him the benefit of the doubt. Otherwise, his complaint would have to be

The plaintiff served in the United States Army and the Army Reserve from 1964-1970. His sentence included one year of combat in Vietnam. He contends that in 1973 he was found to have psychological problems and a "bio-chemistry imbalance," and was later diagnosed with post-traumatic stress disorder ("ptsd") He appears to contend that his problems are the result of his service in Vietnam, during which time he was exposed to the exfoliant Agent Orange.

The plaintiff states in his original complaint that "in 1986 the VA started a monthly compensation." I read the plaintiffs statement to mean that he began receiving veterans benefits at that time. The VA apparently denied the plaintiffs request to award him benefits retroactively to 1973, and the plaintiff appealed. After his appeal was denied, the plaintiff filed his original complaint in this court, seeking federal judicial review of that denial.

Magistrate Judge Miles Davis entered a report and recommendation advising this court to dismiss the plaintiffs original complaint for lack of jurisdiction. That report and recommendation is not adopted. Instead, I have reviewed and considered this case myself. Based on my own independent review of the case, I find that I am without jurisdiction to hear the claims in the plaintiffs original complaint.

Title 38, United States code, section 511 (a) provides:

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dismissed for failure to name the proper party. Lawsuits under the FTCA cannot be permitted against individual federal employees or against individual agencies. Galvin v. Occupational Health and Safety Admin., 860 F.2d 181 (5th Cir. 1988).

> (a) The secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provisions of benefits by the Secretary to Veterans or the dependents or survivors of veterans. Subject to subsection (b), the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.

Section 511(b) contains limited exceptions, only one of which need be mentioned here. Section 511(b)(4) provides that matters covered by chapter 72 of Title 38 are subject to judicial review. However, Section 7252(a) provides in pertinent part that [t]he court of Veterans Appeals shall have exclusive jurisdiction to review decisions of the Board of Veterans Appeals." Therefore, even if the plaintiff is seeking timely judicial review of a reviewable decision, I do not have jurisdiction to entertain his claim. Accordingly, his original complaint is DISMISSED for lack of jurisdiction.

Soon after filing his objections to the magistrate judge's report and recommendation, the plaintiff filed an amended complaint. The amended complaint alleges a cause of action against the United States of America and the Department of Veterans Affairs, under the FTCA. In his amended complaint, the plaintiff alleges that he suffers from PTSD, and that he has suffered physical injuries from exposure to Agent Orange. The plaintiff also alleges that both conditions are related to his service in the military. According to the plaintiff, the defendant negligently failed to provide adequate medical care for his conditions, and failed to warn him of the dangers from the exposure to Agent Orange and the effects of untreated stress.

He seeks the sum of 5,000,000 for expenses and pain and suffering.

In cases brought under the FTCA, the United States is liable for torts in the same manner and to the same extent as a private individual under like circumstances. See 28 U.S.C. §§ 1346 (B), 2674. Section 2675(a) requires the claimant to present his tort claim to the appropriate federal agency before instituting suit against the United States under the FTCA. A claim is deemed presented when it provides written notification of an incident and requests money damages in sum certain. See Adams v. United States, 615 F.2d 284, 289 (5th Cir. 1980). "Section 2675 (a) is satisfied if the claimant (1) gave the appropriate agency written notice of the tort claim to enable the agency to investigate; and (2) stated a sum certain as to the value of the claim." Orlando Helicopter Airways v. United States, 75 F.3d 622, 624 (11th cir, 1996) (citing Free v. United States, 885 F.2d 840,842 (11th cir.1989).

The plaintiff alleges in his complaint that he submitted his claim to the Department of Justice, Tort Claims Division, on May 26,1993. The plaintiff also alleges that he sought a sum certain (250,000) for his injuries. However, the plaintiff did not include a copy of his agency claim form with his amended complaint. Therefore, it is difficult to determine whether the plaintiff properly exhausted his administrative remedies. There are only two allegations in the amended complaint with respect to the claim the plaintiff submitted to the agency. The first one states that the plaintiff's "claim form notified the agency that the United States Army withheld information from their 1969 research on Post-Traumatic Stress Disorder." The second one states that the plaintiff provided the agency with a magazine article from Fort Wayne, Indiana, which gave the agency notice of his exposure to Agent Orange. Based on these two

allegations, the plaintiff contends that he properly presented his claim to the agency. I disagree.

The claimant must give the agency a sufficient description of the incident causing his injury, to enable the agency to conduct its own investigation. Adams v. United States, supra, 615 F.2d at 289. The allegations in the amended complaint fall far short of that standard. The amended complaint contains claims for negligence in the handling of Agent Orange and for failure to warn the plaintiff of the dangers of exposure to Agent Orange and the effects of untreated stress. The plaintiff also alleges that the defendant negligently and deliberately withheld medical treatment, and that the Bureau of Veteran's Affairs negligently processed his claim. Of these claims, the only one that could, arguably, have been properly presented to the agency is his claim that the defendant negligently failed to warn him of the effects of untreated stress. The plaintiff's contention that he put the agency on notice that he was also seeking damages for exposure to Agent Orange, by providing the agency with a magazine article is without merit. Similarly, the plaintiff's claim did not allege that the defendant deliberately withheld medical treatment. Since these claims were not properly presented to the agency, I lack jurisdiction to review them. Orlando Helicopter Airways v. United States, 75 F.3d 622, 624 (11th Cir. 1996); Free v. United States, 885 F.2d 840, 842 (11th Cir. 1989).

As mentioned above, the only claim that could possibly qualify as having been properly presented is the plaintiff's allegation that the defendant failed to warn him of the effects of untreated stress. However, to the extent that the plaintiff's claim for failure to warn arises from conduct that occurred during his service in the military, or the military services, it must be DISMISSED. A member of armed forces cannot sue the

government in tort for injuries that arise out of or are in course of activity incident to service. Feres v. United States, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed.2d 152 (1950). Individuals on reserve status fall within the Feres bar. See Quintana v. United States, 997 F.2d 711, 712 (10th Cir. 1993); Duffy v. United States, 966 F.2d 307 (7th Cir. 1992); Norris v. Lehman, 845 F.2d 283, 286-87 (11th Cir. 1988); Estate of Martinelli v. United States Department of the Army, 812 F.2d 872, 873 (3d Cir. 1987); Mattos v. United States, 412 F.2d 793, 794 (9th Cir. 1969); United States v. Carroll, 369 F.2d 618, 620 (8th Cir. 1966).

"Incident to service" is a broad concept that depends on a rational connection between the plaintiff's claim or loss and his status as a member of the armed forces. Woodside v. United States, 606 F.2d 134, 141 (6th Cir. 1979). Several courts of appeals have held that the Feres doctrine bars tort actions where the duty to warn originated when the injured serviceman was in the armed forces and merely continued after discharge. See, e.g., Heilman v. United States, 731 F.2d 1104 (3d Cir. 1984); Gaspard v. United States, 713 F.2d 1097 (5th Cir. 1983); Lombard v. United States, 690 F.2d 215 (D.C. Cir. 1982); Laswell v. Brown, 683 F.2d 1146 (5th Cir. Unit B 1981).[2] According to the plaintiff's complaint, the defendant knew about the effects of untreated stress during the time that the plaintiff was serving in the Army Reserve. The complaint alleges that the defendants knew about the effects of untreated stress as early as 1969, and deliberately withheld this medcial evidence so as to cut costs in providing adequate medical care to veterans.

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[2]In Bonner v. City of Pritchard, 661 F.2d 1206 (11th Cir. 1981)(en banc), the Eleventh Circuit adopted as precedent the decisions of the Fifth Circuit rendered prior to October 1, 1981.

According to the complaint, the plaintiff was not discharged from the Army Reserve until 1970. Therefore, any negligent failure to warn occurred, at least in part, during his time as a serviceman, and is barred by the Feres doctrine. See Stanley v. Central Intelligence Agency, 639 F.2d 1146 (5th Cir. Unit B 1981).

I note several courts have held that a new duty to warn the plaintiff can arise after his discharge from the military, if the government's knowledge concerning the hazard increased sufficiently to warrant the creation of such a duty. See e.g., Cole v. United States, 755 F.2d 873, 879 (11th Cir. 1985). In Cole v. United States, the court did not apply the Feres doctrine because it determined that the plaintiff's injury was not incident to service. However, in this case, the plaintiff has not alleged facts sufficient to state a negligence claim based on a post-discharge duty to warn. Specifically, the plaintiff has failed to allege that a new duty to warn arose after he left the military, or that the conduct by the United States causing his injury occurred entirely after he left the service. Id. at 876.

Finally, even if the plaintiff had alleged facts sufficient to state a claim for post-discharge failure to warn, his claim would be barred by the two year statute of limitations applicable to FTCA actions. See 28 U.S.C. § 2401(b). "Though phrased in the disjunctive, this statute requires a claimant to file an administrative claim within two years and file his complaint within six months of its denial." See Houston v. United States Postal Service, 823 F.2d 896, 902 (5th Cir. 1987); see also Dyniewicz v. United States, 742 F.2d 484, 485 (9th Cir. 1984); Willis v. United States, 719 F.2d 608, 612 (2d Cir. 1983). The plaintiff claims that he did not know that he suffered from PTSD until the Board of Veterans' Appeals denied his request for retroactive benefits for his PTSD related injuries, in April of

1993. That contention is clearly without merit. The Atlanta, Georgia, Regional Office of the United States Department of Veterans Affairs allowed service connection for plaintiff's PTSD in late 1985, or early 1986. The plaintiff did not present his negligence claim to the Department of Justice until May 1993, almost eight years later. A cause of action accrues when the plaintiff has a reason to suspect or was aware of facts that would have alerted a reasonable person to the possibility that a legal duty had been breached. United States v. Kubrick, 444 U.S. 111, 125, 100 S.Ct. 352, 360, 62 L.Ed.2d 259 (1979). Without further facts, the plaintiff's claim for failure to warn accrued in 1986, when it was first determined that he suffered from PTSD.

For the reasons discussed above, the plaintiff's original complaint and his amended complaint are DISMISSED.

DONE and ORDERED this *30th* day of January, 1998.

/s/
ROGER VINSON
Chief United States District Judge

JUDGMENT IN A CIVIL CASE

United States District Court	Northern District of Florida
Case Title:	Docket Number
CHARLES B. WELLS	3:97–cv-507/RV/MD
v.	Name of Judge or Magistrate Judge
UNITED STATES OF AMERICA,	ROGER VINSON

☐ **Jury Verdict.** This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came to trial or hearing before the Court with the judge (magistrate judge) named above presiding. The issues have been tried or heard and a decision has been rendered.[1]

IT IS ORDERED AND ADJUDGED

THAT THE PLAINTIFF TAKE NOTHING AND THAT THIS CASE BE DISMISSED

ROBERT A MOSSING, CLERK January 30, 1998

By Deputy Clerk: T. Abrams

Entered on Docket January 30, 1998 by TEA
(Rules 58 & 79(a) FRCP or 32(b)(1) & 55 FRCP)

Copies mailed to: Wells, COB 1998

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[1]There was no hearing or trial in this matter, nor had service been perfected before this erroneous judgment was entered. Also, there was no prior notice of the intent to dismiss.

First Amendment to Constitution of the United States:

Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment to Constitution of the United States:

No person shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Federal Rule of Civil Procedure 4:

Rule 4. Summons

(a) Form. The summons shall be signed by the clerk, bear the seal of the court, identify the court and the parties, be directed to the defendant, and state the name and address of the plaintiff's attorney or, if unrepresented, of the plaintiff. It shall also state the time within which the defendant must appear and defend, and notify the defendant that failure to do so will result in a judgment by default against the defendant for the relief demanded in the complaint. The court may allow a summons to be amended.

(b) Issuance. Upon or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is in proper form, the clerk shall sign, seal, and issue it to the plaintiff for service on the defendant. A summons, or a copy of the summons if addressed to multiple defendants, shall be issued for each defendant to be served.

(c) Service with Complaint; by Whom Made.

(1) A summons shall be served together with a copy of the complaint. The plaintiff is responsible for service of a summons and complaint within the time allowed under subdivision (m) and shall

furnish the person effecting service with the necessary copies of the summons and complaint.

(2) Service may be effected by any person who is not a party and who is at least 18 years of age. At the request of the plaintiff, however, the court may direct that service be effected by a United States marshal, deputy United States marshal, or other person or officer specially appointed by the court for that purpose. Such an appointment must be made when the plaintiff is authorized to proceed in forma pauperis pursuant to 28 U.S.C. Sec. 1915 or is authorized to proceed as a seaman under 28 U.S.C. Sec. 1916.

(d) Waiver of Service; Duty to Save Costs of Service; Request to Waive.

(1) A defendant who waives service of a summons does not thereby waive any objection to the venue or to the jurisdiction of the court over the person of the defendant.

(2) An individual, corporation, or association that is subject to service under subdivision (e), (f), or (h) and that receives notice of an action in the manner provided in this paragraph has a duty to avoid unnecessary costs of serving the summons. To avoid costs, the plaintiff may notify such a defendant of the commencement of the action and request that the defendant waive service of a summons. The notice and request

(A) shall be in writing and shall be addressed directly to the defendant, if an individual, or else to an officer or managing or general agent (or other agent authorized by appointment or law to receive service of process) of a defendant subject to service under subdivision (h);

(B) shall be dispatched through first-class mail or other reliable means;

(C) shall be accompanied by a copy of the complaint and shall identify the court in which it has been filed;

(D) shall inform the defendant, by means of a text prescribed in an official form promulgated pursuant to Rule 84, of the consequences of compliance and of a failure to comply with the request;

(E) shall set forth the date on which the request is sent;

(F) shall allow the defendant a reasonable time to return the waiver, which shall be at least 30 days from the date on which the request is sent, or 60 days from that date if the defendant is addressed outside any judicial district of the United States; and

(G) shall provide the defendant with an extra copy of the notice and request, as well as a prepaid means of compliance in writing. If a defendant located within the United States fails to comply with a request for waiver made by a plaintiff located within the United States, the court shall impose the costs subsequently incurred in effecting service on the defendant unless good cause for the failure be shown.

(3) A defendant that, before being served with process, timely returns a waiver so requested is not required to serve an answer to the complaint until 60 days after the date on which the request for waiver of service was sent, or 90 days after that date if the defendant was addressed outside any judicial district of the United States.

(4) When the plaintiff files a waiver of service with the court, the action shall proceed, except as provided in paragraph (3), as if a summons and complaint had been served at the time of filing the waiver, and no proof of service shall be required.

(5) The costs to be imposed on a defendant under paragraph (2) for failure to comply with a request to waive service of a summons shall include the costs subsequently incurred in effecting service under

subdivision (e), (f), or (h), together with the costs, including a reasonable attorney's fee, of any motion required to collect the costs of service.

(e) Service Upon Individuals Within a Judicial District of the United States. Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in any judicial district of the United States:

(1) pursuant to the law of the state in which the district court is located, or in which service is effected, for the service of a summons upon the defendant in an action brought in the courts of general jurisdiction of the State; or

(2) by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

(f) Service Upon Individuals in a Foreign Country. Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in a place not within any judicial district of the United States:

(1) by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents; or

(2) if there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:

(A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or

(B) as directed by the foreign authority in response to a letter rogatory or letter of request; or

(C) unless prohibited by the law of the foreign country, by

(i) delivery to the individual personally of a copy of the summons and the complaint; or

(ii) any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or

(3) by other means not prohibited by international agreement as may be directed by the court.

(g) Service Upon Infants and Incompetent Persons. Service upon an infant or an incompetent person in a judicial district of the United States shall be effected in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state.

Service upon an infant or an incompetent person in a place not within any judicial district of the United States shall be effected in the manner prescribed by paragraph (2)(A) or (2)(B) of subdivision (f) or by such means as the court may direct.

(h) Service Upon Corporations and Associations. Unless otherwise provided by federal law, service upon a domestic or foreign corporation or upon a partnership or other unincorporated association that is subject to suit under a common name, and from which a waiver of service has not been obtained and filed, shall be effected:

(1) in a judicial district of the United States in the manner prescribed for individuals by subdivision (e)(1), or by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant, or

(2) in a place not within any judicial district of the United States in any manner prescribed for individuals by subdivision (f) except personal delivery as provided in paragraph (2)(C)(i) thereof.

(i) Service Upon the United States, and Its Agencies, Corporations, or Officers.

(1) Service upon the United States shall be effected

(A) by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court or by sending a copy of the summons and of the complaint by registered or certified mail addressed to the civil process clerk at the office of the United States attorney and

(B) by also sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia, and

(C) in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered or certified mail to the officer or agency.

(2) Service upon an officer, agency, or corporation of the United States shall be effected by serving the United States in the manner prescribed by paragraph (1) of this subdivision and by also sending a copy of the summons and of the complaint by registered or certified

mail to the officer, agency, or corporation.

(3) The court shall allow a reasonable time for service of process under this subdivision for the purpose of curing the failure to serve multiple officers, agencies, or corporations of the United States if the plaintiff has effected service on either the United States attorney or the Attorney General of the United States.

(j) Service Upon Foreign, State, or Local Governments.

(1) Service upon a foreign state or a political subdivision, agency, or instrumentality thereof shall be effected pursuant to 28 U.S.C. Sec. 1608.

(2) Service upon a state, municipal corporation, or other governmental organization subject to suit shall be effected by delivering a copy of the summons and of the complaint to its chief executive officer or by serving the summons and complaint in the manner prescribed by the law of that state for the service of summons or other like process upon any such defendant.

(k) Territorial Limits of Effective Service.

(1) Service of a summons or filing a waiver of service is effective to establish jurisdiction over the person of a defendant

(A) who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located, or

(B) who is a party joined under Rule 14 or Rule 19 and is served at a place within a judicial district of the United States and not more than 100 miles from the place from which the summons issues, or

(C) who is subject to the federal interpleader jurisdiction under 28 U.S.C. Sec. 1335, or

(D) when authorized by a statute of the United States.

(2) If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

(l) Proof of Service. If service is not waived, the person effecting service shall make proof thereof to the court. If service is made by a person other than a United States marshal or deputy United States marshal, the person shall make affidavit thereof. Proof of service in a place not within any judicial district of the United States shall, if effected under paragraph (1) of subdivision (f), be made pursuant to the applicable treaty or convention, and shall, if effected under paragraph (2) or (3) thereof, include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court. Failure to make proof of service does not affect the validity of the service. The court may allow proof of service to be amended.

(m) Time Limit for Service. If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period. This subdivision does not apply to service in a foreign country pursuant to subdivision (f) or (j)(1).

(n) Seizure of Property; Service of Summons Not Feasible.

(1) If a statute of the United States so provides, the court may assert jurisdiction over property. Notice to claimants of the property shall then be sent in the manner provided by the statute or by service of a summons under this rule.

(2) Upon a showing that personal jurisdiction over a defendant cannot, in the district where the action is brought, be obtained with reasonable efforts by service of summons in any manner authorized by this rule, the court may assert jurisdiction over any of the defendant's assets found within the district by seizing the assets under the circumstances and in the manner provided by the law of the state in which the district court is located.

Title 28 USC Sec. 1346 (b). United States as defendant

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Title 28 USC Sec. 2672

Sec. 2672. Administrative adjustment of claims

The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred: Provided, That any award, compromise, or

settlement in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee.

Notwithstanding the proviso contained in the preceding sentence, any award, compromise, or settlement may be effected without the prior written approval of the Attorney General or his or her designee, to the extent that the Attorney General delegates to the head of the agency the authority to make such award, compromise, or settlement. Such delegations may not exceed the authority delegated by the Attorney General to the United States attorneys to settle claims for money damages against the United States. Each Federal agency may use arbitration, or other alternative means of dispute resolution under the provisions of subchapter IV of chapter 5 of title 5, to settle any tort claim against the United States, to the extent of the agency's authority to award, compromise, or settle such claim without the prior written approval of the Attorney General or his or her designee.

Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be final and conclusive on all offices of the Government, except when procured by means of fraud. Any award, compromise, or settlement in an amount of $2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency. Payment of any award, compromise, or settlement in an amount in excess of $2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title shall be paid in a manner similar to judgments and compromises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter.

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

Title 28 USC Section 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

Title 28 U.S.C. Sec. 2675. Disposition by federal agency as prerequisite; evidence

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section.

The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time or presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

28 CFR Sec. 14.2 Administrative claim; when presented.

(a) For purposes of the provisions of 28 U.S.C. 2401(b), 2672, and 2675, a claim shall be deemed to have been presented when a Federal agency receives from a claimant, his duly authorized agent or legal representative, an executed Standard Form 95 or other written notification of an incident, accompanied by a claim for money damages in a sum certain for injury to or loss of property, personal injury, or death alleged to have occurred by reason of the incident; and the title or legal capacity of the person signing, and is accompanied by evidence of his authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian, or other representative.

28 CFR Sec. 14.2 (b)(1) A claim shall be presented to the Federal agency whose activities gave rise to the claim. When a claim is presented to any other Federal agency, that agency shall transfer it forthwith to the appropriate agency, if the proper agency can be identified from the claim, and advise the claimant of the transfer. If transfer is not feasible the claim shall be returned to the claimant. The fact of transfer shall not, in itself, preclude further transfer, return of the claim to the claimant or other appropriate disposition of the claim. A claim shall be presented as required by 28 U.S.C. 2401(b) as of the date it is received by the appropriate agency.

28 CFR Sec 14.2 (b)(2) When more than one Federal agency is or may be involved in the events giving rise to the claim, an agency with which the claim is filed shall contact all other affected agencies in order to designate the single agency which will thereafter investigate and decide the merits of the claim. In the event that an agreed upon designation cannot be made by the affected agencies, the Department of Justice shall be consulted and will thereafter designate an agency to investigate and decide the merits of the claim. Once a determination has been made, the designated agency shall notify the claimant that all future correspondence concerning the claim shall be directed to that Federal agency. All involved Federal agencies may agree either to conduct their own administrative reviews and to coordinate the results

or to have the investigations conducted by the designated Federal agency, but, in either event, the designated Federal agency will be responsible for the final determination of the claim.

28 CFR Sec. 14.2 (b) (3) A claimant presenting a claim arising from an incident to more than one agency should identify each agency to which the claim is submitted at the time each claim is presented. Where a claim arising from an incident is presented to more than one Federal agency without any indication that more than one agency is involved, and any one of the concerned Federal agencies takes final action on that claim, the final action thus taken is conclusive on the claims presented to the other agencies in regard to the time required for filing suit set forth in 28 U.S.C. 2401(b). However, if a second involved Federal agency subsequently desires to take further action with a view towards settling the claim the second Federal agency may treat the matter as a request for reconsideration of the final denial under 28 CFR 14.9(b), unless suit has been filed in the interim, and so advise the claimant.

28 CFR Sec. 14.2 (b)(4) If, after an agency final denial, the claimant files a claim arising out of the same incident with a different Federal agency, the new submission of the claim will not toll the requirement of 28 U.S.C. 2401(b) that suit must be filed within six months of the final denial by the first agency, unless the second agency specifically and explicitly treats the second submission as a request for reconsideration under 28 CFR 14.9(b) and so advises the claimant.

28 CFR Sec. 14.2 (c) A claim presented in compliance with paragraph (a) of this section may be amended by the claimant at any time prior to final agency action or prior to the exercise of the claimant's option under 28 U.S.C. 2675(a). Amendments shall be submitted in writing and signed by the claimant or his duly authorized agent or legal representative. Upon the timely filing of an amendment to a pending claim, the agency shall have six months in which to make a final disposition of the claim as amended and the claimant's option under 28 U.S.C. 2675(a) shall not accrue until six months after the

filing of an amendment.

[Order No. 870-79, 45 FR 2650, Jan. 14, 1980, as amended by Order No. 960-81, 46 FR 52355, Oct. 27, 1981; Order No. 1179-87, 52 FR 7411, Mar. 11, 1987]

28 CFR Sec. 14.8 Investigation and examination.

A Federal agency may request any other Federal agency to investigate a claim filed under section 2672, title 28, U.S. Code, or to conduct a physical examination of a claimant and provide a report of the physical examination. Compliance with such requests may be conditioned by a Federal agency upon reimbursement by the requesting agency of the expense of investigation or examination where reimbursement is authorized, as well as where it is required, by statute or regulation.

38 CFR Sec. 14.604 Filing a claim.

(a) Each person who inquires as to the procedure for filing a claim against the United States, predicated on a negligent or wrongful act or omission of an employee of the Department of Veterans Affairs acting within the scope of his or her employment, will be furnished a copy of SF 95, Claim for Damage, Injury, or Death. The claimant will be advised to submit the executed claim directly to the Regional Counsel having jurisdiction of the area wherein the occurrence complained of took place. He or she will also be advised to submit the information prescribed by 28 CFR 14.4 to the extent applicable. If a claim is presented to the Department of Veterans Affairs which involves the actions of employees or officers of other agencies, it will be forwarded to the Department of Veterans Affairs General Counsel, who will transmit forthwith to the appropriate agency.

38 CFR Sec. 14.604 Filing a claim.

(b) A claim shall be deemed to have been presented when the Department of Veterans Affairs receives from a claimant, his or her duly authorized agent or legal representative, an executed SF 95, or other written notification of an incident, together with a claim for money damages, in a sum certain, for damage to or loss of property or personal injury or death: Provided, however, That before compromising or settling any claim, an executed SF 95 shall be obtained from the claimant.

38 CFR Sec. 14.604 Filing a claim.

(c) A claim presented in compliance with paragraphs (a) and (b) of this section may be amended by the claimant at any time prior to final Department of Veterans Affairs action or prior to the exercise of the claimant's option under 28 U.S.C. 2675(a). Amendments shall be submitted in writing and signed by the claimant or his or her duly authorized agent or legal representative. Upon the timely filing of an amendment to a pending claim, the Department of Veterans Affairs shall have 6 months in which to make a final disposition of the claim as amended and the claimant's option under 28 U.S.C. 2675(a) shall not accrue until 6 months after the filing of the amendment (see Sec. 14.600(b)(1)).

[42 FR 41414, Aug. 17, 1977, as amended at 61 FR 27784, June 3, 1996]

Sec. 2401. Time for commencing action against United States

(a) Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.